IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No: 05-CV-0329-GKF-PJC**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY TO DEFENDANTS' OBJECTION AND RESPONSE TO MOTION *IN LIMINE* PERTAINING TO ANY ALLEGED ADVERSE IMPACT WHICH MAY RESULT IF THE RELIEF REQUESTED BY THE STATE IS GRANTED (DKT. #2427)

Plaintiff, the State of Oklahoma, ex. rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (hereinafter "the State"), respectfully submits its Reply to "Defendants' Objection and Response to Plaintiffs' [SIC] Motion *in Limine* Pertaining to Any Alleged Adverse Impact Which May Result if the Relief Sought by the State is Granted (Dkt. #2427)" (Dkt. #2494) ("Response"):

A. Evidence and Argument Regarding Any Alleged Economic Impact that May Result from the Relief Requested by the State are *Categorically* Inadmissible for the Purposes of Trial Before the *Jury*

In their Response, Defendants erroneously claim that the State has "cited no case which directly indicates that it is inappropriate for the effect of the [injunctive] relief being requested to be considered by a jury." Response at 5. On the contrary, in the Motion *in Limine*, the State cited *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and *Computer Associates Int'l, Inc. v. American Fundware, Inc.*, 831 F.Supp. 1516 (D.Colo.

1993). *See* Dkt. #2494 at 8. The *Dairy Queen* decision stands for the black letter legal principle that equitable claims are for the district court's determination while legal claims are for the jury's determination. *Dairy Queen,* 369 U.S. at 479. In *Computer Associates*, the court excluded the defendant's evidence of the potential economic consequences of an injunction, reasoning that the "claim for injunctive relief is a matter for [court's] determination, not the jury's" and "[a]ny financial data relevant to this claim will be presented to [court] after the jury reaches a verdict, not during trial." *Computer Associates,* 831 F.Supp. at 1528.

It is well-established that "[u]nder the Federal Rules [of Civil Procedure] the same court may try both legal and equitable causes in the same action." *Beacon Theaters, Inc. v. Westover,* 359 U.S. 500, 508 (1959). It is similarly well-established that the right to trial by jury in federal court is not lost as to legal issues, even where those issues are incidental to equitable issues. *Tull v. U.S.,* 481 U.S. 412, 425 (1987); *Dairy Queen,* 369 U.S. at 470. "The order of trial must be arranged so that any issues common to the legal claim and claim for injunction are tried to a jury at the outset, with the court thereafter resolving any purely equitable issues in the case." 9 Wright & Miller, *Fed. Prac. & Proc. Civ.3d* §2308 (2009) (citing *Beacon Theaters*) (other citations omitted); *see also Dairy Queen,* 369 U.S. at 479 ("Since these [legal] issues are common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims.") It is axiomatic that because this Court -- and not the jury -- will decide whether the requested permanent injunction will issue in this case, evidence and

argument regarding any alleged economic impact that could result from the issuance of said injunction are categorically inadmissible before the jury.

Defendants assert that "[a] strong argument can be made that the *Computer Associates* case has very limited precedential value as it is a misappropriations case and the Court had other stronger reasons for keeping out financial data of companies involved." Response at 5. Whether such a "strong argument" actually exists or not, Defendants certainly have not made it here. The *Computer Associates* Court gave no indication that its holding was limited to the misappropriations context or that its rationale was based on anything other than the fundamental principle that courts, and not juries, determine whether an injunction should issue. Indeed, *Computer Associates* is rather unremarkable in applying this basic procedural rule. In sum, even if any economic impact (*i.e.*, increase in the price of chicken, lost tax revenues) evidence or argument is considered by the Court in making an equitable determination, such evidence or argument unequivocally cannot be properly presented to the jury.

B. Balancing of Harms Evidence is Irrelevant Because the State is a Sovereign Entity

As shown in the State's Motion, other jurisdictions have held that the balancing of the equities prong of the injunction test is inapplicable in a case where the plaintiff is a sovereign state. It is the State's argument that under this rule, balancing of the harms evidence is inadmissible before the jury and the Court. In *Environmental Defense Fund, Inc. v. Lamphier,* 714 F.2d 331, 337-38 (4th Cir. 1983), a case involving a RCRA claim brought by state agencies, the Fourth Circuit held and reasoned as follows:

> [T]he law of injunctions differs with respect to governmental plaintiffs (or private attorneys general) as opposed to private individuals. Where the plaintiff is a sovereign and the activity may endanger public health, "injunctive relief is proper,

> without resort to balancing." *Illinois v. [City of] Milwaukee*, 599 F.2d 151, 166 (7th Cir. 1979), *rev'd on other grounds*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981).
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> ***
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> "The United States . . . is not bound to conform with the requirements of private litigation when it seeks the aid of courts to give effect to the policy of Congress as manifested in a statute. It is a familiar doctrine that an injunction is an appropriate means for enforcement of an Act of Congress when it is in the public interest." *Shafer v. United States*, 229 F.2d 124, 128 (4th Cir. 1956). *This rationale applies equally to state enforcement of federal and state health laws.*

(emphasis added).

Defendants assert that this rule is inapplicable here because the "Tenth Circuit has authoritatively announced the relevant [injunction] standard in this very case." Response at 3. However, the Tenth Circuit's decision in this case dealt solely with the issue of whether the Court properly denied the State's Motion for *Preliminary* Injunction. *See State of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 796 (10th Cir. 2009). Thus, the Tenth Circuit's decision should have no bearing on whether this Court must balance the harms in deciding whether to grant a permanent injunction. In fact, balancing of the harms was not at issue in that appeal because this Court denied the State's Motion for Preliminary Injunction based solely on its determination that the State had failed to meet the "substantial likelihood of success on the merits" prong of the preliminary injunction test. Indeed, the Tenth Circuit has never decided the issue of whether courts may dispense with balancing of harms where the plaintiff is a sovereign state.

The rule set forth in *Lamphier* and *Illinois v. Milwaukee* is eminently reasonable and should be applied in this case. Here, the State is a sovereign entity seeking to enjoin an activity that may endanger public health. Additionally, the State also seeks the aid of the courts to give effect to the policy of Congress as manifested in a statute -- that is,

RCRA's purpose in protecting the public from the disposal of solid waste such that it may present an imminent and substantial endangerment to health or the environment. The State, as a sovereign entity, should not be bound to conform to the requirements of private litigation in such a case. Assuming the State indeed makes its case on the merits that the disposal of Defendants' poultry waste "may present" an imminent and substantial endangerment to health or the environment, it would contravene the important public policy of RCRA for Defendants to present balancing of harms evidence. Defendants should not be permitted to avoid liability for creating an imminent and substantial endangerment to health or the environment based on evidence of alleged economic harm to Defendants or third parties which could result if an injunction issues. In sum, because the Court need not balance the harms in this case, evidence concerning alleged economic harm to Defendants or any third party is irrelevant for the purposes of trial before a jury and this Court.

C. The Third Party Poultry Growers are Not Parties to this Litigation

In the case at bar, while the third party poultry growers are agents of the corporate Defendants, they are not "parties" to this litigation. Many courts have recognized the obvious point that even employees of a party corporation are not themselves "parties" to litigation. *See, e.g., El Dorado Irrigation Dist., Inc. v. Traylor Bros., Inc.*, 2007 WL 512428, *10 (E.D.Cal. Feb. 12, 2007); *N.L.R.B. v. Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 615 (9thCir. 1973); *Pochat v. State Farm Mutual Automobile Ins. Co.*, 2008 WL 5192427, *6 (D.S.D. Dec. 11, 2008). Thus, any alleged economic hardship that such third parties could experience if the requested relief is granted is irrelevant and inadmissible for the purposes of this litigation. *See Prairie Band of Potawatomi Nation*

v. Wagnon, 476 F.3d 818, 822 (10th Cir. 2007) (the permanent injunction test deals with whether "the threatened injury [to the plaintiff] outweighs the harm that the injunction may cause the opposing ***party***") (emphasis added). In their Response, Defendants baldly argue that alleged economic harm to the poultry growers is relevant under the "balancing of the equities element…" Response at 4. However, Defendants do not claim that the growers are parties to the litigation. Plainly, they are not. Because they are not parties, any alleged economic harm to the growers cannot be relevant under the balancing of the harms prong.

WHEREFORE, premises considered, the State respectfully requests that the Court grant its Motion *in Limine* Pertaining to Any Alleged Adverse Impact Which May Result if the Relief Sought by the State is Granted.

Respectfully submitted,

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I certify that on the 4th day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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